

EXHIBIT 1

1 COOLEY LLP
MICHAEL G. RHODES (116127) (rhodesmg@cooley.com)
2 MATTHEW D. BROWN (196972) (brownmd@cooley.com)
JEFFREY M. GUTKIN (216083) (gutkinjm@cooley.com)
3 101 California Street
5th Floor
4 San Francisco, CA 94111-5800
Telephone: (415) 693-2000
5 Facsimile: (415) 693-2222

6 Attorneys for Defendant
FACEBOOK, INC.

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF LOS ANGELES – CENTRAL DISTRICT

11 DAVID A. COHEN, a minor, by and through
ROBIN S. COHEN as Guardian ad Litem;
12 SHELBY A. ORLAND, a minor, by and
through MARCIA J. ORLAND as Guardian
13 ad Litem; for all others similarly situated,

14 Plaintiffs,

15 v.

16 FACEBOOK, INC., a Delaware corporation,
and DOES 1 through 100, Inclusive,

17 Defendants.
18

19 AND ALL CONSOLIDATED CASES
20
21

Case No. BC 444482
Consolidated with Case No. BC 454799

(Class Action)

**DEFENDANT FACEBOOK, INC.'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF ITS
MOTION FOR ATTORNEYS' FEES**

Date: February 8, 2012
Time: 8:30 a.m.
Judge: Hon. Debra Katz Weintraub
Courtroom: 47

Complaint Filed: October 12, 2011
Trial Date: Not set

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. FACTUAL AND PROCEDURAL BACKGROUND	2
A. Plaintiffs' Allegations and Demands For Relief	2
B. Facebook's Attorneys	2
C. Facebook's Attorneys' Work on this Litigation	3
1. Facebook's Demurrers	3
2. Discovery	5
III. FACEBOOK'S FEE REQUEST	5
IV. DISCUSSION	6
A. Facebook Is Entitled to Attorneys' Fees	7
B. Facebook's Fee Request Is Reasonable	10
1. Facebook Seeks Fees for Reasonable Hours Spent Defending Itself	10
2. Facebook Seeks Compensation at Reasonable Hourly Rates	12
3. The Total Fee Award Sought Is Reasonable	14
V. CONCLUSION	15

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Bernardi v. Cnty. of Monterey</i> , 167 Cal. App. 4th 1379 (2008).....	5, 11
<i>Bihun v. AT&T Info. Sys., Inc.</i> , 13 Cal. App. 4th 976 (1993).....	12
<i>Cairns v. Franklin Mint Co.</i> , 115 F. Supp. 2d 1185 (C.D. Cal. 2000).....	11
<i>Cairns v. Franklin Mint Co.</i> , 292 F.3d 1139 (9th Cir. 2002).....	14
<i>Cal. Common Cause v. Duffy</i> , 200 Cal. App. 3d 730 (1987).....	11
<i>Church of Scientology v. Wollersheim</i> , 42 Cal. App. 4th 628 (1996).....	14, 15
<i>Coltrain v. Shewalter</i> , 66 Cal. App. 4th 94 (1998).....	7, 8
<i>Dease v. City of Anaheim</i> , 838 F. Supp. 1381 (C.D. Cal. 1993)	15
<i>Donner Mgmt. Co. v. Schaffer</i> , 124 Cal. App. 4th 1296 (2006).....	8
<i>Earley v. Super. Ct.</i> , 79 Cal. App. 4th 1420 (2000).....	10
<i>Equillon Enters., LLC v. Consumer Cause, Inc.</i> , 29 Cal. 4th 53 (2002)	14
<i>Graciano v. Robinson Ford Sales, Inc.</i> , 144 Cal. App. 4th 140 (2006).....	8, 9
<i>Graham v. DaimlerChrysler Corp.</i> , 34 Cal. 4th 553 (2004)	10
<i>Guinn v. Dotson</i> , 23 Cal. App. 4th 262 (1994).....	10
<i>Harman v. City and Cnty. of S.F.</i> , 158 Cal. App. 4th 407 (2007).....	9

TABLE OF AUTHORITIES
(continued)

	Page(s)
<i>Hogar v. Cmty. Dev. Comm'n of Escondido</i> , 157 Cal. App. 4th 1358 (2007).....	11
<i>In re Innkeepers USA Trust</i> , 448 B.R. 131 (S.D.N.Y. 2011).....	13
<i>Ketchum v. Moses</i> , 24 Cal. 4th 1122 (2001)	6
<i>Kirby v. Sega of Am., Inc.</i> , 144 Cal. App. 4th 47 (2006).....	7, 9
<i>Lakin v. Watkins Associated Indus.</i> , 6 Cal. 4th 644 (1993)	12
<i>Love v. Associated Newspapers, Ltd.</i> , 611 F.3d 601 (9th Cir. 2010).....	7, 9
<i>Love v. Mail on Sunday</i> , No. CV05-7798 ABC(PJWX), 2007 WL 2709975 (C.D. Cal. Sept. 7, 2007).....	7, 9, 15
<i>Pena Canal v. De La Rosa Dann</i> , No. 09-03366 CW, 2011 U.S. Dist. LEXIS 99863 (N.D. Cal. Sept. 6, 2011).....	14
<i>PLCM Grp., Inc. v. Drexler</i> , 22 Cal. 4th 1084 (2000)	10, 12
<i>Plumbers & Steamfitters, Local 290 v. Duncan</i> , 157 Cal. App. 4th 1083 (2007).....	11
<i>Raining Data Corp v. Barrenechea</i> , 175 Cal. App. 4th 1363 (2009).....	5, 11
<i>Robertson v. Fleetwood Travel Trailers of Cal., Inc.</i> , 144 Cal. App. 4th 785 (2006).....	10
<i>Salehi v. Surfside III Condo. Owners' Assoc.</i> , 200 Cal. App. 4th 1146, 132 Cal. Rptr. 3d 886 (2011).....	7, 8
<i>Salton Bay Marina, Inc. v. Imperial Irrigation Dist.</i> , 172 Cal. App. 3d 914 (1985).....	10
<i>Santisas v. Goodin</i> , 17 Cal. 4th 599 (1998)	7, 8

TABLE OF AUTHORITIES
(continued)

	Page(s)
<i>Serrano v. Priest</i> , 20 Cal. 3d 25 (1977)	10
<i>Serrano v. Unruh</i> , 32 Cal. 3d 621 (1982)	10, 11, 12
<i>Trs. of Constr. Indus. & Laborers Health & Welfare Trust v. Redland Ins. Co.</i> , 460 F.3d 1253 (9th Cir. 2006).....	11
<i>Van de Kamp v. Bank of Am. Nat'l Trust & Savings Ass'n</i> , 204 Cal. App. 3d 819 (1988).....	10
<i>Vo v. Las Virgenes Mun. Water Dist.</i> , 79 Cal. App. 4th 440 (2000).....	11
<i>Weber v. Langholz</i> , 39 Cal. App. 4th 1578 (1995).....	5, 11
STATUTES	
Cal. Civ. Code § 3344	passim

1 I. INTRODUCTION

2 Plaintiffs in these consolidated actions alleged that Facebook displayed their and putative
3 class members' names, likenesses, and "like" statements, without parental consent, alongside
4 advertisements for content they had "liked." Plaintiffs brought claims for violation of California
5 Civil Code Section 3344 ("Section 3344"), the California constitutional right to privacy, and
6 California Business and Professions Code Section 17200 (the "UCL"). After four rounds of
7 demurrer briefing, the Court held that all of Plaintiffs' claims were preempted by the federal
8 Children's Online Privacy Protection Act ("COPPA") and dismissed all claims with leave to
9 amend. Plaintiffs filed another amended complaint that failed to rectify the many problems
10 plaguing the earlier, dismissed complaint. Then, the day before Facebook's deadline to file its
11 next demurrer (and not in time to forego the demurrer), Plaintiffs sought voluntary dismissal of
12 the action, which the Court later granted. Plaintiffs stated that their request for dismissal was
13 based, in part, on their "consideration of the Court's previous rulings in this matter." Facebook is
14 the "prevailing party" and is entitled to *mandatory* attorneys' fees and costs under Section 3344,
15 as well as its fees and costs for prevailing on Plaintiffs' other related claims.

16 Facebook respectfully requests that the Court award fees of \$790,523.68. Facebook's fee
17 request is appropriate and reasonable under the lodestar method given the nature of the work
18 required on these two cases, including, among other things, five rounds of briefing on demurrers
19 (in response to Plaintiffs' repeated, but ultimately futile, amendments), a supplemental brief
20 ordered by the Court, a motion to consolidate the two actions, court hearings, and responding to
21 Plaintiffs' discovery requests. Indeed, Facebook's request is conservative insofar as it does not
22 seek fees for all of the time actually expended by its attorneys to defend these cases, despite being
23 entitled to all such fees under the law. Facebook's fee request is also reasonable in light of the
24 other factors that courts typically consider: Plaintiffs' sweeping demands for relief, including an
25 injunction, hundreds of millions of dollars in statutory damages, actual damages, disgorgement of
26 profits, restitution, and fees and costs; the nature of the litigation and complexity of the issues;
27 and the quality of Facebook's presentation to the Court and the successful result achieved—
28 dismissal of all claims.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Plaintiffs' Allegations and Demands For Relief

In their pre-consolidation complaints, their post-consolidation First Master Class Action Complaint ("FMAC"), and their First Amended Consolidated Class Action Complaint ("FAC"), Plaintiffs, teenage Facebook users, alleged that Facebook used their and putative class members' names and/or likenesses, without parental consent, in connection with advertisements. (*See, e.g.,* Cohen Compl. ¶¶ 8, 29-37; Meth Compl. ¶¶ 7, 49-56; FMAC ¶¶ 5, 13, 40-48; FAC ¶¶ 5, 16, 20, 48-55.) Plaintiffs alleged that Facebook's display of users' names and/or likenesses violated their statutory rights against misappropriation (Section 3344), the California constitutional right to privacy, and the UCL. In addition to injunctive relief, Plaintiffs sought hundreds of millions of dollars in statutory damages, actual damages, disgorgement of profits, restitution, and fees and costs. (Cohen Compl. at 16-17; Meth Compl. at 12; FMAC at 19-20; FAC at 16-17.) As discussed below, the Court sustained Facebook's demurrer to the FAC, holding that all claims were preempted by COPPA.

B. Facebook's Attorneys

Cooley LLP represented Facebook in this case. Senior partner Michael Rhodes and partner Matthew D. Brown led the litigation, developed strategy, and supervised the work on the case, with Mr. Brown managing the day-to-day work on the matter and handling all court appearances. Partner Jeffrey M. Gutkin developed legal strategy and supervised preparation of the multiple demurrers required to respond to Plaintiffs' successive amended complaints. The remainder of the core team of Cooley attorneys was comprised of sixth-year associate Benjamin Kleine, third-year associate Kelly Cooke, and second-year associate Megan Donohue. Generally speaking, throughout the litigation, Mr. Kleine managed team projects and revised briefs, and Ms. Cooke and Ms. Donohue performed the bulk of the research, initial document drafting, and assisted in the discovery process. (Decl. of Matthew D. Brown filed herewith ("Brown Decl."), ¶¶ 2-4.) As such, Cooley's team at any one time primarily consisted of three partners, one senior associate, and two junior associates. The core team thus provided the necessary stratification to have appropriately experienced lawyers working on tasks suited to their experience. (*Id.*) Further

1 description of the qualifications, experience, and work performed on this litigation by these and
2 other team members is contained in the Brown Declaration. (*See id.* ¶¶ 2-12, Exs. A-D.)

3 **C. Facebook's Attorneys' Work on this Litigation**

4 Facebook mounted a vigorous and thorough defense because of the sweeping relief
5 Plaintiffs demanded. Plaintiffs sought statutory damages of \$750 per person on behalf of a
6 putative class that Plaintiffs estimated would include "more than one million" minor California
7 residents. (FAC ¶ 22(a); FMAC ¶ 15(a).) Even at Plaintiffs' lowest estimate of 1,000,000 users,
8 Plaintiffs claimed in excess of \$750 million in statutory damages. Furthermore, in *addition to*
9 *statutory damages*, Plaintiffs sought *actual damages*. (FAC at 16 (Plaintiffs seek "economic
10 damages for [] commercial misappropriation" and "non-economic damages for
11 misappropriation"); FMAC at 19 (same).) Plaintiffs also demanded injunctive relief, restitution,
12 disgorgement, and their fees and costs. (FAC at 16-17; FMAC at 20.)

13 **1. Facebook's Demurrers**

14 Plaintiffs brought claims under Section 3344—claims that are rarely litigated at all,
15 particularly by non-celebrities and in class actions. Plaintiffs' claims required extensive research
16 and analysis of complex legal issues, including the preemptive effect of COPPA to claims
17 brought by minors over the age of 13; the pleading required to state a claim for economic or non-
18 economic injury under Section 3344 by a non-celebrity plaintiff who had not alleged any prior-
19 existing commercial value in his name and/or likeness or resulting mental anguish from the
20 publication; whether the alleged publication was for Facebook's "advantage" or "the purposes of
21 advertising" as defined by Section 3344; the application of the "newsworthy" exception under
22 Section 3344(d) and First Amendment protections to expressions of consumer opinions by non-
23 celebrity plaintiffs; and Facebook's immunity to Plaintiffs' claims under the Communications
24 Decency Act, 47 U.S.C. § 230 ("CDA § 230"). Facebook was also required to research and
25 analyze the legal issues arising from Plaintiffs' constitutional right to privacy and UCL claims.

26 Facebook successfully researched, drafted, and argued five complete and partial rounds of
27 demurrers in response to Plaintiffs' individual and consolidated complaints. As explained below,
28 two of these rounds of briefing were the direct result of Plaintiffs' own tactics—requiring

1 Facebook to spend substantial time to prepare demurrer briefing (and, in one instance, even to
2 present oral argument on the demurrer) and then, without advance notice, taking actions that
3 rendered the demurrer moot.

4 Facebook's first demurrer in the individual *Cohen* action was filed on December 16, 2010,
5 with a hearing on March 17, 2011. At the hearing, the Court ordered simultaneous briefing from
6 both parties to further address Facebook's argument that CDA § 230 provided a complete defense
7 to Plaintiffs' claims. In accord with the Court's order, Facebook researched, drafted, and filed its
8 supplemental brief on April 18, 2011. In contrast, Plaintiffs did *not* file their supplemental brief
9 as ordered, but instead filed a First Amended Complaint on April 26, 2011. Plaintiffs did not
10 inform Facebook of their intentions, thereby ensuring that Facebook would incur the costs of
11 preparing the brief (and then amending their complaint only *after* seeing Facebook's
12 supplemental CDA § 230 arguments). On June 10, 2011, Facebook filed its demurrer to the First
13 Amended Complaint in the individual *Cohen* action. During this same period, on May 13, 2011,
14 Facebook filed its demurrer to the First Amended Complaint in the individual *Meth* action.

15 In order to increase efficiencies, Facebook proposed consolidation of the *Cohen* and *Meth*
16 actions. Facebook led the effort to reach agreement among the parties and to draft a joint motion
17 to consolidate, thereby further decreasing motion practice. On June 28, 2011 the Court ordered
18 consolidation of the *Meth* and *Cohen* actions, and ordered Plaintiffs to file a consolidated
19 complaint. On July 5, 2011, Plaintiffs filed the consolidated FMAC, to which Facebook filed a
20 demurrer on August 4, 2011. The Court sustained Facebook's demurrer, holding that COPPA
21 preempted all three of Plaintiffs' claims. (See Notice of Entry Order Granting Facebook's
22 Demurrer (Sept. 30, 2011) (attached as Brown Decl. Ex. E) Ex. A at 2, 12.) The Court noted that
23 the remaining portions of Facebook's demurrer were *not* otherwise overruled. (*Id.* at 3.) The
24 Court granted Plaintiffs "the opportunity to redefine the proposed class to plead claims that are
25 not preempted." (*Id.* at 12.)

26 Despite the Court's guidance, on October 12, 2011, Plaintiffs filed an amended complaint,
27 the FAC, that made relatively minor revisions to the dismissed FMAC and did not substantively
28 redefine the proposed class. On November 15, 2011, Facebook filed its fifth demurrer in these

actions. The parties had agreed to this filing date, and the Court had entered it as part of a broader briefing schedule. Rather than adhering to this schedule, Plaintiffs requested voluntary dismissal of their action without prejudice on November 14, 2011, providing Facebook with notice of the request at 4:43 p.m. on the same day. Plaintiffs stated that their request was based, in part, on their "continued evaluation of the applicable legal claims, along with consideration of the Court's previous rulings in this matter." (Decl. of Anthony Stuart i/s/o Pls.' Req. Vol. Dism. ("Stuart Decl.") ¶ 6.) On November 23, 2011, the Court granted Plaintiffs' request.

2. Discovery

Although this case did not proceed past the demurrer stage, Plaintiffs elected to pursue discovery despite Facebook's view that discovery should be stayed unless and until the Court allowed Plaintiffs' claims to proceed. In February 2011, Plaintiffs in *Cohen* served requests for production, requests for admission, special interrogatories, and form interrogatories. Facebook's counsel undertook significant efforts to analyze Plaintiffs' requests, prepare written responses, work with Facebook to ascertain what responsive documents and information existed, and meet and confer with Plaintiffs. Facebook agreed to extend the deadline to file any motion to compel, thereby further eliminating unnecessary motion practice.

III. FACEBOOK'S FEE REQUEST

Facebook seeks total attorneys' fees in the amount of \$790,523.68: (1) \$737,461.50 for time spent by Cooley attorneys and other timekeepers through dismissal, (2) \$33,920 in fees to prepare this motion, and (3) \$19,142.18 in costs incurred for online legal research allowable as attorneys' fees. This amount represents reasonable time spent by Facebook's attorneys to defend these class action lawsuits seeking potentially over \$750 million in damages and other relief.

Cooley's time records, without text narrative, are attached as Exhibit F to the Brown Declaration.¹ Further, Table 1 shows the hours that Cooley timekeepers expended in this matter,

¹ Consistent with established California case law, Facebook has included a summary of the services rendered but has not included Cooley's full time records with the corresponding text narrative. See *Raining Data Corp v. Barrenechea*, 175 Cal. App. 4th 1363, 1375 (2009) (citing *Bernardi v. County of Monterey*, 167 Cal. App. 4th 1379, 1398 (2008)) (holding "[t]he law is clear, [] that an award of attorney fees may be based on counsel's declarations, without production of detailed time records"); *Weber v. Langholz*, 39 Cal. App. 4th 1578, 1585 (1995). If the Court

1 with the corresponding fee totals. (Brown Decl. ¶ 19.) Table 2 breaks down these fees by month,
2 with a description of the primary work performed that month.² (*Id.* ¶ 20.) Tables 3-1 and 3-2
3 show the time expended by timekeeper, broken down by month. (*Id.* ¶ 21.) Facebook's fees for
4 time expended in the cases prior to preparation of this motion are \$737,461.50.

5 In addition to time spent through dismissal of the case in November 2011 (reflected in
6 Tables 1-3), Facebook's attorneys also spent additional time in November and December 2011
7 researching and preparing this motion for attorneys' fees and supporting documents. (*Id.* ¶ 22.)³
8 Facebook seeks compensation for 72 hours spent by Cooley in researching and preparing this
9 motion (significantly less than the total time spent), for \$33,920 in fees. (*Id.*) Table 4 reflects
10 actual hours spent by the listed Cooley professionals on this motion and can be substantiated by
11 contemporaneous time records. (*Id.*)

12 Finally, Facebook seeks \$19,142.18 in costs for online legal research (*see id.* ¶ 23) that are
13 allowable as attorneys' fees under applicable law.

14 Accordingly, Facebook seeks a total of \$790,523.68 for reasonable attorneys' fees.

15 IV. DISCUSSION

16 Under California law, Facebook is entitled to recover its fees for prevailing on Plaintiffs'
17 Section 3344 claim and all other related claims. Facebook's fee request is reasonable in light of
18 the results achieved, the complexity of the issues presented, and other factors described below.

19
20
21
22
23
24
25
26
27
28
deems it appropriate, however, Facebook will provide the full time records for *in camera* review
(with appropriate, limited redactions for privilege).

² Table 2 summarizes the primary work performed each month, but relatively small amounts of
time were spent on additional tasks inherent in any litigation, such as client communications,
analysis of general case strategy, and communications with opposing counsel on case
management issues. These are not reflected in the summary of work performed on Table 2.

³ Facebook has included time actually incurred to the date this motion. Facebook reserves the
right to seek attorneys' fees and costs for the review of any such opposition, further briefing, or
other arguments or actions taken by counsel with respect to the motion for attorneys' fees and
costs. Furthermore, in the event that Plaintiffs decline to pay any award of fees promptly,
Facebook reserves the right to seek additional fees and costs in connection with collecting upon
the award. *See Ketchum v. Moses*, 24 Cal. 4th 1122, 1141 n.6 (2001) (fees expended in collecting
a judgment, including an attorney fee award, are properly included in a fee award).

1 **A. Facebook Is Entitled to Attorneys' Fees**

2 Plaintiffs alleged that Facebook's display of users' names and/or likenesses violated their
3 statutory right against misappropriation (Section 3344), the California constitutional right to
4 privacy, and the UCL.⁴ Facebook is entitled to recover reasonable fees for its attorneys' work
5 defending against all of Plaintiffs' claims.

6 Under Section 3344, an award of fees and costs to the prevailing party is mandatory. *See*
7 Cal. Civ. Code § 3344(a) ("[t]he prevailing party in any action under this section *shall also be*
8 entitled to attorney's fees and costs") (emphasis added); *Kirby*, 144 Cal. App. 4th at 62 (affirming
9 fee award to prevailing defendant and stating that "[t]he mandatory fee provision of section 3344,
10 subdivision (a) leaves no room for ambiguity"); *Love v. Mail on Sunday*, No. CV05-7798
11 ABC(PJWX), 2007 WL 2709975, at *2-3 (C.D. Cal. Sept. 7, 2007) (applying California law and
12 granting attorneys' fees and costs to defendants for their defense of claims brought under Section
13 3344), *aff'd Love v. Associated Newspapers, Ltd.*, 611 F.3d 601, 614 (9th Cir. 2010) (noting that
14 Section 3344 "mandates" the recovery of attorneys' fees and costs).

15 Here, Facebook is the prevailing party. In determining who the prevailing party is, the
16 Court should analyze "which party [] prevailed on a practical level." *Salehi v. Surfside III Condo.*
17 *Owners' Ass'n*, 200 Cal. App. 4th 1146, 132 Cal. Rptr. 3d 886, 890 (2011). A party prevails
18 where it "has realized its litigation objectives, whether by judgment, settlement, or otherwise."
19 *Santisas v. Goodin*, 17 Cal. 4th 599, 621-22 (1998). Upon "voluntary dismissal, a presumption
20 [arises] that defendants were the prevailing parties." *Coltrain v. Shewalter*, 66 Cal. App. 4th 94,
21 107 (1998); *see also id.* (considering that the critical issue is which party realized its objectives in
22 the litigation, where the plaintiff voluntarily dismisses an alleged SLAPP suit while the
23 defendant's motion to strike the complaint is pending, "ordinarily the prevailing party will be the
24 defendant"). The California Supreme Court's analysis in *Santisas* applies here. In that case, the
25 court gave the following explanation for why the defendant was the prevailing party:

26
27

28 ⁴ Plaintiffs themselves requested attorneys' fees and costs. (*See* FMAC at 20 ("Prayer for
Relief"); FAC at 17.)

1 Giving the term 'prevailing party' its ordinary or popular sense, the
2 seller defendants are the prevailing parties in this litigation.
3 Plaintiffs' objective in bringing this litigation was to obtain the
4 relief requested in the complaint. The objective of the seller
5 defendants in this litigation was to prevent plaintiffs from obtaining
6 that relief. Because the litigation terminated in voluntary dismissal
with prejudice, plaintiffs did not obtain by judgment any of the
relief they requested, nor does it appear that plaintiffs obtained this
relief by another means, such as a settlement. Therefore, plaintiffs
failed in their litigation objective and the seller defendants
succeeded in theirs.

7 17 Cal. 4th at 609. Facebook has achieved its "litigation objective"—preventing Plaintiffs from
8 obtaining the relief they requested in their complaint. Plaintiffs have not achieved anything—
9 either by settlement or otherwise. Indeed, Plaintiffs filed their notice of voluntary dismissal only
10 after the Court summarily dismissed their consolidated complaint. In voluntarily dismissing the
11 action, counsel for Plaintiffs stated they were doing so after "continued evaluation of the
12 applicable legal claims, along with consideration of the Court's previous rulings in this matter."
13 (Stuart Decl. ¶ 6.) Where plaintiffs voluntarily dismiss actions without prejudice shortly after
14 suffering setbacks in the same or related litigation, California courts have consistently held that
15 the defendant is the prevailing party. *See, e.g., Salehi*, 132 Cal. Rptr. 3d at 888, 891-92 (holding
16 that defendant was prevailing party where plaintiff dismissed eight of her ten claims shortly
17 before trial after losing related litigation in which she was the representing attorney); *Donner*
18 *Mgmt. Co. v. Schaffer*, 142 Cal. App. 4th 1296, 1302, 1311 (2006) (holding that defendant was
19 the prevailing party in derivative suit where plaintiff dismissed case without prejudice one month
20 after Special Litigation Committee decided it was not in the best interests of the corporation to
21 pursue the litigation); *Coltrain*, 66 Cal. App. 4th at 96, 107-08, 110 (holding that defendant was
22 prevailing party pursuant to the anti-SLAPP statute when plaintiffs dismissed their claims without
23 prejudice shortly after defendant filed its motion to strike).

24 Facebook is also entitled to recover fees for prevailing on the two remaining claims that
25 are related to Plaintiffs' Section 3344 claim, each of which was also dismissed. Under California
26 law, where claims not governed by a fee-shifting statute involve a common core of facts with, or
27 are based on related legal theories to, a claim governed by a fee-shifting statute, courts may and
28 do award fees for time spent on the other claims. *See Graciano v. Robinson Ford Sales, Inc.*, 144

1 Cal. App. 4th 140, 159 (2006) (“Attorneys fees need not be apportioned between distinct causes
2 of action where . . . various claims involve a common core of facts or are based on related legal
3 theories.” (citation omitted)). In fact, where the issues between claims are “so inextricably
4 intertwined that it would be impractical or impossible to separate the attorney’s time into
5 compensable and noncompensable units,” courts routinely award fees for all of the claims.
6 *Harman v. City & Cnty. of S.F.*, 158 Cal. App. 4th 407, 417 (2007) (citation omitted); *see also*
7 *Love*, 2007 WL 2709975, at *2-3 (granting attorneys’ fees and costs for causes of action related
8 to claims brought under Section 3344) (citing *Kirby*, 144 Cal. App. 4th at 62 n.7); *Love*, 611 F.3d
9 at 614 (“Where no independent basis existed to support an award, the district court found the
10 claims ‘inextricably intertwined with claims’ that had such a support. We agree.”).

11 Facebook is entitled to fees for work done on Plaintiffs’ constitutional right of privacy and
12 UCL claims, both of which relied on the same factual allegations as Plaintiffs’ Section 3344
13 claim. *See Graciano*, 144 Cal. App. 4th at 159. For example, Plaintiffs’ FAC alleged that
14 Facebook violated Plaintiff’s constitutional right of privacy via the “commercial use of plaintiffs’
15 name and likeness” (FAC ¶ 61), the same allegations that formed their Section 3344 claim (FAC
16 ¶ 51). Further, Plaintiffs’ UCL claim was expressly predicated on Facebook’s alleged violation
17 of Section 3344 (FAC ¶ 57), making an award of fees for work done on the UCL claim
18 appropriate. *See Love*, 2007 WL 2709975, at *7 (granting attorneys’ fees and costs for UCL
19 claim “predicated on” a claim for violation of Section 3344). Lastly, the Court dismissed
20 Plaintiffs’ right of privacy and UCL claims for the same reason it rejected Plaintiffs’ other
21 claims—preemption by COPPA. (*See Brown Decl. Ex. E*, at Ex. A (sustaining demurrer and
22 holding “Plaintiff’s claims based on state law for Facebook’s alleged failure to obtain the parental
23 consent of users aged 13 to 17 to the commercial use of their name and likeness is preempted by
24 the Children’s Online Privacy Protection Act”).)

25 Thus, Facebook is entitled to recover reasonable fees for defending against all three of
26 Plaintiffs’ claims that were based on a common core of factual allegations and were inextricably
27
28

intertwined with each other.⁵

B. Facebook's Fee Request Is Reasonable

Under California law, the method for calculating attorneys' fees is firmly established. Courts first calculate the lodestar based on "the number of hours reasonably expended multiplied by the reasonable hourly rate." *PLCM Grp., Inc. v. Drexler*, 22 Cal. 4th 1084, 1095 (2000). To be reasonable, fees must be "reasonably necessary to the conduct of the litigation, and [] reasonable in amount." *Robertson v. Fleetwood Travel Trailers of Cal., Inc.*, 144 Cal. App. 4th 785, 817-18 (2006). And "[t]he reasonable hourly rate is that prevailing in the community for similar work." *PLCM Grp.*, 22 Cal. 4th at 1095. The lodestar may then be adjusted based on consideration of factors specific to the case, in order to fix the fee at the fair market value for the legal services provided. *See Serrano v. Priest*, 20 Cal. 3d 25, 49 (1977).

Time spent by paralegals, law clerks, and other support professionals is also compensable if the local practice is to bill for their services in that manner. *Guinn v. Dotson*, 23 Cal. App. 4th 262, 269 (1994); *Salton Bay Marina, Inc. v. Imperial Irrigation Dist.*, 172 Cal. App. 3d 914, 951 (1985). In Southern California, time spent by paralegals and certain practice-support professionals is typically billed to clients. (Clark Decl. ¶ 7; Brown Decl. ¶ 12.)

In addition to compensation for fees spent litigating the case, a prevailing party is also entitled to fees for time spent preparing and litigating the fee application itself. *Serrano v. Unruh*, 32 Cal. 3d 621, 632-38 (1982); *Graham v. DaimlerChrysler Corp.*, 34 Cal. 4th 553, 581 (2004).

1. Facebook Seeks Fees for Reasonable Hours Spent Defending Itself

Under the lodestar method, a prevailing party is presumptively entitled to compensation

⁵ The named Plaintiffs owe a fiduciary duty to unnamed plaintiffs and bear responsibility for any fees and costs award to Facebook. *See Van de Kamp v. Bank of Am. Nat'l Trust & Savings Ass'n*, 204 Cal. App. 3d 819, 869 (1988) ("While imposition of the entire cost burden on the named plaintiffs may have a chilling effect on the willingness of plaintiffs to bring class action suits, this effect easily may be outweighed by the potential recovery. All potential litigants must weigh costs of suit against likelihood of success and possible recovery before deciding to file suit. Those who choose to take the risks of litigation should be the ones who bear the cost when they are unsuccessful, not those who did not make the choice."); *Earley v. Super. Ct.*, 79 Cal. App. 4th 1420, 1434-36 (2000) ("We believe . . . that the better rule is that the only time absent class members who have failed to opt-out should be liable for fees and costs is when the class prevails and the class members accept the benefit of a common fund recovery.") (emphasis in original).

1 for all hours reasonably spent. See *Vo v. Las Virgenes Mun. Water Dist.*, 79 Cal. App. 4th 440,
2 446 (2000) (citing *Serrano*, 32 Cal. 3d at 632-33). Facebook is therefore entitled to attorneys'
3 fees for all work reasonably expended, whether successful on all arguments or not. See *Hogar v.*
4 *Cnty. Dev. Comm'n*, 157 Cal. App. 4th 1358, 1369 (2007).

5 Facebook seeks compensation for 1614.5 hours expended by Cooley working on this
6 litigation, including in the preparation of this motion for attorneys' fees. Facebook has submitted
7 sworn declarations in support of this fee application demonstrating that the time spent by Cooley
8 was justified and reasonable.⁶ See *Weber*, 39 Cal. App. 4th at 1586-87 (holding that declaration
9 made under penalty of perjury was evidence of the reasonableness of the number of hours
10 worked); *Raining Data Corp.*, 175 Cal. App. 4th at 1375 (citing *Bernardi v. Cnty. of Monterey*,
11 167 Cal. App. 4th 1379, 1398 (2008)) ("[t]he law is clear, [] that an award of attorney fees may be
12 based on counsel's declarations, without production of detailed time records"). As discussed
13 above, Cooley's core team of three partners, one senior associate, and two junior associates
14 performed the vast majority of work for the fees claimed in this motion. (Brown Decl. ¶¶ 2-4.)
15 The number of hours claimed is reasonable given the proceedings in the case and complexity of
16 issues presented. Over of the course of 14 months, Facebook had to file *five* rounds of briefing on
17 demurrers, a supplemental brief addressing Facebook's CDA § 230 immunity, and a motion to
18 consolidate the individual *Cohen* and *Meth* actions, and respond to written discovery requests.⁷
19 (*Id.* ¶¶ 6-12.)

20 Notably, Facebook is not seeking compensation for all of the time Facebook's counsel

21
22 ⁶ Facebook has a confidential and privileged alternative fee arrangement with Cooley that applies
23 to this case (among others), but this motion seeks recovery only for time actually spent by Cooley
attorneys and other professionals to defend this particular litigation. (Brown Decl. ¶ 18.)

24 ⁷ Facebook also seeks \$19,142.18 in costs for online legal research (see Brown Decl. ¶ 23), which
25 are allowable as attorneys' fees under applicable law. See *Plumbers & Steamfitters, Local 290 v.*
26 *Duncan*, 157 Cal. App. 4th 1083, 1099 (2007) (granting, as attorneys' fees, charges incurred for
27 computerized legal research) (citing *Trs. of Constr. Indus. & Laborers Health & Welfare Trust v.*
28 *Redland Ins. Co.*, 460 F.3d 1253, 1258-59 (9th Cir. 2006)); *Cal. Common Cause v. Duffy*, 200
Cal. App. 3d 730, 753-54 (1987) (same); *Catrns v. Franklin Mint Co.*, 115 F. Supp. 2d 1185,
1189 (C.D. Cal. 2000) (same; Section 3344 case). These online legal research costs were accrued
by Cooley attorneys performing online legal research related to this case. (Brown Decl. ¶ 23.)
Facebook is thus entitled to compensation of these costs in the form of attorneys' fees.

1 reasonably spent to defend this litigation. *First*, Facebook has excluded from this fee application
2 more than 84 hours of time spent by regularly employed timekeepers. (*Id.* ¶ 16, Ex. F.) The
3 exclusion (or reduction) of this time is reflected by grey highlighting on the chart attached as
4 Exhibit F to the Brown Declaration. These excluded or reduced time entries were for, *inter alia*,
5 all time spent on this litigation by Cooley's research librarians, time spent bringing new Cooley
6 team members up to speed on case law and arguments, and a conservative estimate of travel time
7 to and from court hearings not otherwise spent doing substantive work on this litigation. (*Id.*)
8 *Second*, even though Facebook's in-house counsel expended considerable time defending against
9 Plaintiffs' claims (*see* Clark Decl. ¶¶ 3-4) and such fees are compensable under the law, *see*
10 *PLCM Grp.*, 22 Cal. 4th at 1097 (prevailing party's in-house counsel entitled to compensation
11 for fees, even if not billed), Facebook is not seeking compensation for that time.

12 2. Facebook Seeks Compensation at Reasonable Hourly Rates

13 Counsel are entitled to be compensated at hourly rates that reflect the reasonable market
14 value of their services in the community. *Serrano*, 32 Cal. 3d at 643. Rates are considered
15 reasonable if they fall within the range of rates charged by private attorneys of similar skill,
16 reputation, and experience for comparably complex litigation. *Bihun v. AT&T Info. Sys., Inc.*, 13
17 Cal. App. 4th 976, 997 (1993), *overruled on other grounds by Lakin v. Watkins Associated Indus.*,
18 6 Cal. 4th 644, 664 (1993).

19 Facebook's counsel's rates satisfy these criteria. Cooley is a prominent national law firm.
20 (Brown Decl. ¶ 24.) Mr. Rhodes is chair of Cooley's litigation department and was named one of
21 *The Daily Journal's* Top 100 lawyers in California in 2011 and an "Attorney of the Year" in 2010
22 by California legal newspaper *The Recorder*. (*Id.* ¶ 4(a) & Ex. B.) He has substantial experience
23 representing technology companies and, specifically, litigating class actions, including those
24 involving privacy-related claims. Mr. Rhodes's billing rate in 2011 is \$930/hour. (*Id.*) Mr.
25 Brown, who supervised the case on a day-to-day basis, has over 13 years of experience as a
26 litigator, with a broad practice that currently focuses on complex commercial disputes and class
27 actions, Internet-related issues, and privacy-related issues. (*Id.* ¶ 2, Ex. A.) His billing rate in
28 2011 is \$630/hour. (*Id.* ¶ 3.) Mr. Gutkin, who supervised much of the demurrer briefing in this

1 matter, has extensive experience in class actions and other complex business litigation matters.
2 (*Id.* ¶ 4(b), Ex. C.) His billing rate in 2011 is \$615/hour. (*Id.*) Mr. Kleine, Ms. Cooke, and Ms.
3 Donohue's 2011 billing rates are \$580/hour (for a sixth-year associate), \$425/hour (for a third-
4 year associate) and \$375/hour (for a second-year associate), respectively. (*Id.* ¶¶ 4(c)-4(e).)
5 (Further description of the experience and work performed on this litigation by all team members
6 is contained in the Brown Declaration. (*See id.* ¶¶ 2-4 & Exs. A-D.)

7 Cooley's rates are well within the norm for California billing rates for national law firms.
8 For example, data available from PeerMonitor, a service that tracks court filings around the
9 country, shows that for attorneys based in Southern California or the San Francisco Bay Area, the
10 median billing rate for sixth-year associates at Weil, Gotshal & Manges LLP, Morrison &
11 Foerster LLP, Fish & Richardson P.C., and Gibson Dunn & Crutcher LLP—all national law firms
12 with significant presences in California—is \$592/hour, and the median for fifth-year associates is
13 \$565/hour. (*Id.* ¶ 25(a) & Ex. G.) Similarly, data from Valeo Partners, another service that tracks
14 court filings, shows that in 2011 for attorneys based in Southern California, second-year
15 associates (graduation date 2009) were billed at \$420 to \$515/hour at Latham & Watkins LLP,
16 \$435/hour at Paul Hastings LLP, \$430/hour at Gibson Dunn & Crutcher LLP, and \$550/hour at
17 Milbank Tweed Hadley & McCloy LLP. (*See* Declaration of Chuck Chandler ("Chandler Decl.")
18 Ex. B.) Third-year associates (graduation date 2008) were billed at \$510/hour at Gibson Dunn,
19 \$570/hour at Latham & Watkins, \$600/hour at Milbank Tweed, and \$450/hour at Morrison &
20 Foerster LLP. (*Id.*) The Valeo data similarly shows partners based in Southern California at
21 Dewey & LeBoeuf LLP, Gibson Dunn, Latham & Watkins, Milbank Tweed, Proskauer Rose
22 LLP, and Quinn Emanuel Urquhart & Sullivan, LLP, with billing rates of \$910 to \$1,095/hour.

23 Westlaw Court Express also maintains a database that includes the billable hour rates
24 submitted in connection with bankruptcy fee petitions that are also relevant to prevailing market
25 rates for national firms. That database shows that in 2011, rates at Paul Hastings and Milbank
26 Tweed were \$395 to \$450/hour for second-year associates, \$495 to \$500/hour for third-year
27 associates, \$500/hour for fifth-year associates, and \$605 to \$620/hour for sixth-year associates.
28 (Brown Decl. ¶ 23(b) & Ex. H.) In *In re Innkeepers USA Trust*, 448 B.R. 131 (S.D.N.Y. 2011),

Morrison & Foerster LLP—a national law firm based in California—stated that its 2011 billing rates ranged from \$635 to \$1,075/hour for partners, \$335 to \$660/hour for associates, and \$180 to \$310/hour for paraprofessionals. (*See id.* ¶ 23(c) & Ex I.) Courts in California have also found rates similar to the rates charged by Cooley to be reasonable. For example, in *Pena Canal v. de la Rosa Dann*, No. 09-03366 CW, 2011 U.S. Dist. LEXIS 99863, at *5, *10 (N.D. Cal. Sept. 6, 2011), the court found that 2009 and 2010 rates for senior, midlevel, and junior associates at Orrick, Herrington & Sutcliffe LLP—a national law firm based in San Francisco—of \$600 to \$645/hour, \$505 to \$530/hour, and \$330 to \$430/hour, respectively, were reasonable for the San Francisco legal community.

Cooley's rates are therefore comparable to peer firms in the market and reasonable.

3. The Total Fee Award Sought Is Reasonable

Facebook's fee request is also reasonable in light of the other factors that courts typically consider, including "the nature of the litigation, its difficulty, the amount involved, the skill required and the skill employed in handling the litigation, the attention given, the success of the attorney's efforts, his learning, his age, and his experience in the particular type of work demanded . . . the intricacies and importance of the litigation, the labor and necessity for skilled legal training and ability in trying the cause, and the time consumed." *Church of Scientology v. Wollersheim*, 42 Cal. App. 4th 628, 659 (1996), *disapproved of on other grounds by Equilon Enters., LLC v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 68 n.5 (2002).

First, the total fees amounting to \$790,523.68 are reasonable in light of the relief sought by Plaintiffs. Plaintiffs sought statutory damages in excess of \$750 million on behalf of a putative class of at least 1,000,000 individuals, actual damages, disgorgement of profits, restitution, and fees and costs. The fees sought by Facebook thus represent less than 0.11% of the *minimum* damages Plaintiffs sought in this action—and a much lower percentage of the possible relief Plaintiffs would ultimately seek. *See Church of Scientology*, 42 Cal. App. 4th at 659 (in determining what constitutes a reasonable fee award, the court may consider "the amount involved" and the "importance of the litigation"); *see also Cairns v. Franklin Mint Co.*, 292 F.3d 1139, 1159 (9th Cir. 2002) (holding that fee award under California law was reasonable where

1 "the ratio between the attorneys' fees awarded to [defendant] and the damages sought [by
2 plaintiff] in this unsuccessful Lanham Act case is at most one to fourteen").

3 *Second*, the fee request is also reasonable considering the nature of the litigation, a
4 putative class action alleging commercial misappropriation of millions of users' names and/or
5 likenesses in connection with Facebook, a new online platform. *See Church of Scientology*, 42
6 Cal. App. 4th at 659 (listing "nature of the litigation" as a factor in determining reasonableness).

7 *Third*, Cooley's fees are reasonable in light of the success ultimately achieved—a
8 complete dismissal of all claims—and the quality of the papers submitted and lawyering
9 employed. *See Church of Scientology*, 42 Cal. App. 4th at 659 (listing "the success of the
10 attorney's efforts" as a factor).⁸

11 *Fourth*, Cooley exercised considerable judgment throughout the case with respect to
12 attorney time. Cooley concentrated the majority of the work across six attorneys, each of whom
13 had distinct billing-rate-appropriate roles in the case. (*See* Brown Decl. ¶ [I].) *Church of*
14 *Scientology*, 42 Cal. App. 4th at 659 (listing "the time consumed" as a factor).

15 Facebook thus submits that an award of \$790,523.68 in fees is reasonable.

16 **V. CONCLUSION**

17 For the reasons stated above, Facebook respectfully requests that the Court award it
18 \$790,523.68 in attorneys' fees.

19 Dated: December 13, 2011

COOLEY LLP

20 
21 Matthew D. Brown (196972)

22 Attorneys for Defendant FACEBOOK, INC.

23 731997/SD

24
25 ⁸ To the extent Plaintiffs argue that their fees were lower than Facebook's, it is irrelevant. *Dease*
26 *v. City of Anaheim*, 838 F. Supp. 1381, 1383 (C.D. Cal. 1993) ("That defense counsel spent
27 significantly less time on this case than did counsel for the plaintiffs is irrelevant so long as all
28 compensated work was necessary and performed in an expeditious manner." (citation omitted));
Love, 2007 WL 2709975, at *10 ("[T]he greater amount of time defense counsel committed to
this case was reflected in the higher quality of their work. Ultimately, Plaintiff's counsel may
have billed fewer hours, but Plaintiff also lost." (citation omitted)).